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**HIGH COURT OF CHHATTISGARH, BILASPUR**

**Criminal Appeal No. 1213 of 2001**

Ramlal Thakur

**Versus**

State of Chhattisgarh,

**JUDGMENT**

**Post for: 16.07.2007**

Sd/-
Sunil Kumar Sinh
Judge
13.07.2007

AFR

**HIGH COURT OF CHHATTISGARH, BILASPUR**

**Criminal Appeal No. 1213 of 2001**

**APPELLANT** — Ramlal Thakur, aged about 25 years, S/o Burajee Thakur, R/o Village Pataliya, Police Station Balata, District Jalabad (Rajasthan)

Versus

**RESPONDENT** — State of Chhattisgarh, Through Police Station, Civil Line, Raipur, Chhattisgarh.

**(Appeal under Section 374(2) of Cr.P.C.)**

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**Appearance:**

Shri Shailendra Dubey, counsel for the appellant.
Shri Arun Sao, Govt. Advocate, for the State.

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**JUDGMENT**
**(16.07.2007)**

**Sunil Kumar Sinha, J.**

(1) This appeal is directed against the judgment of conviction and order of sentence dated 16.10.2001 passed by the Special Judge (NDPS Act), Raipur in Special Criminal Case No.94/99, whereby the appellant was convicted under Section 18 read with Section 8 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short The NDPS Act) and sentenced to undergo R.I. for 10 years and to pay a fine of Rs.1,00,000/-, in default of payment of fine, to further undergo R.I. for 1 year.

(2) The case of the prosecution is that on an information in relation to commission of a different crime, Sub-Inspector Rajesh Tiwari (P.W.-7) left for Shankarnagar area after making relevant entries in *Rosnamcha Sanha* No. 605 (Ex.-P/18). Thereafter he also went to bus stand in search of culprits of dacoity, where he received information that some persons are sitting at a particular place holding air-bags, in which, there is suspicion of keeping narcotic material. They were located and after

compliance of due provisions of N.D.P.S. Act, when the air-bag of the appellant was searched, it was found that opium in quantity of 4 Kg was there. The seizure memo of the said article was prepared, samples of the seized article were also taken and the packet of the samples as well as remaining article both were sealed. The appellant was taken into custody and was brought to police station. It is stated that at the same time, opium was also seized from the possession of Ramulal, Lalchand & Narayan for which separate proceedings were drawn against them. The seized material was deposited in *Malkhana* and thereafter, it was sent for chemical examination to Forensic Science Laboratory, through memo of Superintendent of Police dated 14.10.99 (Ex.-P/1), from where the report dated 30.10.99 (Ex.-P/25) was received, according to which, the article sent for examination was impure coagulated juice of opium poppy (commonly known as *Afeem*) containing 4.33% morphine.

(3) On trial, the Special Judge framed the charges under Section 18 read with Section 8 of the N.D.P.S. Act and after conclusion, the appellant was convicted and sentenced as aforementioned.

(4) The conviction of the appellant is based on the testimony of the Investigating Officer, Sub-Inspector Rajesh Tiwari (P.W.-7), taking support from the report of chemical analyst.

(5) Learned counsel for the appellant argued that in view of the fact that both the *Panch* witnesses namely- Syed Sadik Ali (P.W.-5) and Awdesh Mishra (P.W.-6) have turned hostile, the conviction on the testimony of Investigating Officer (P.W.-7) was not justified. He relied on the judgment of the Apex Court rendered in the matter of ***Jagdish Vs. State of M.P., (2003) 9 SC 159***. In the said case, the only evidence on which the prosecution case depended was that the evidence of Investigating Officer, who at the relevant time was working as Sub-Inspector Narcotics as both the *Panch* witnesses had not supported the prosecution case and even the driver and conductor of the Bus had also turned hostile and they also did not support the prosecution case and on

analysis of the deposition of Investigating Officer, the Apex Court found that the testimony suffers from many infirmities and it would not be safe to rely upon his sole testimony to hold the guilty of the appellant and in those circumstances, the appeal was allowed.

(6) Principally, so far as legal position in this regard is concerned, it has been settled that if the evidence of the investigating officer is found to be trustworthy and dependable and nothing material has been brought to discredit his evidence in the cross examination or his evidence is otherwise not unreliable, the Criminal Court would be justified in convicting the accused on the sole testimony of the investigating officer. I am fortified in my views by a decision of the Supreme Court rendered in the matter of ***Lopchand Naruji Jat and another -Vs- State of Gujarat (2004) 7 SCC 566***. Normally in cases where the evidence led by the prosecution as to a fact depends solely on the police witnesses, the courts seek corroboration as a matter of caution and not as a matter of a rule. Thus, it is only a rule of prudence, which makes the court to seek corroboration from an independent source, in such cases while assessing the evidence of the police. But in cases where the court is satisfied that the evidence of the police can be independently relied upon then in such cases, there is no prohibition in law that the same cannot be accepted without an independent corroboration. (***Please see Praveen Kumar -Vs- State of Karnataka, (2003) 12 SCC 199***).

(7) In the present case, the Special Judge has held the testimony of Investigating Officer as trustworthy and has recorded the conviction on his such testimony by taking aid and assistance from supporting evidence, therefore, unless his such testimony is assailed and is found to be untrustworthy, the conviction of the appellant cannot be set aside merely on the ground that the *Panch* witnesses have turned hostile and they have not supported the case of prosecution. Jagdish's case, referred by the counsel for the appellant, is principally distinguishable as in that case, the Supreme Court recorded a finding, that in addition to the evidence of

*Panch* witnesses, who turned hostile, the testimony of Investigating Officer had suffered from many infirmities and in that situation, the conviction was set aside.

(8) For assailing the credibility of the prosecution case, learned counsel for the appellant secondly argued that since the sample of the seal was not sent to the FSL, Raipur, therefore, the chances of tampering with the sealed material cannot be fully ruled out in this case. He relied on the decisions rendered in the matter of ***Remgul @ Remulal and others Vs. State of M.P., 2003 (1) EFR 220; The State of Rajasthan Vs. Daulat Ram, AIR 1980 SC 1314 & State of Rajasthan Vs. Gurmail Singh, 2005 Cr.L.R. (SC) 328***.

(9) In Remgul @ Remulal's case (*Supra*), the prosecution has not examined the constable, who had taken article for chemical examination and the sample of seal was also not deposited along with property in the *Malkhana* and kept intact and no evidence was adduced by prosecution in this regard. Adding to this , the provisions of Sections 52, 55 and 57 were also not complied with and in that situation, the High Court held that the prosecution evidence was full of inconsistencies and the accused/appellant was acquitted. In the said judgment itself, a reference has been made to Daulatram's case (*Supra*), in which, the Apex Court held that when the samples of opium changed several hands before reaching public analyst and yet none of those in whose custody the sample remained, were examined by the prosecution to prove that while in their custody the seals of sample were not tampered with, the inevitable fact of omission was that the prosecution failed to rule out the possibility of the samples to be changed or tampered with during the period in question which was a fact which had to be proved affirmatively by the prosecution and consequently the accused could not be convicted.

(10) In Gurmail Singh's case (*Supra*), it was observed by the Apex Court that no sample of the seal was sent along with the sample of article to the concerned Excise Laboratory for the purpose of comparing with the seal

appearing on the sample bottles and there was no evidence to prove satisfactorily that the seals found were in fact the same seals as were put on the sample bottles immediately after seizure of the contraband and on these loopholes, judgment of acquittal recorded by the High Court was upheld.

(11) In this case, sample was sent for chemical examination to the FSL, Raipur vide memo of the Superintendent of Police dated 14.10.99 (Ex.-P/1). A perusal of the memo would show that it has not been mentioned in it that with the sample of the seized article which was sealed, a sample of such seal was sent to the said Laboratory. Learned counsel for the appellant insisted upon to hold that since no sample of seal was sent along with 2 packets as it is not mentioned in the memo of Superintendent of Police, a chance of tampering was there. The document Ex.-P/1 would show that it was sent through Constable Ramgopal Sharma, who was examined as P.W.-1. He has deposed vide Para-1 of his examination-in-chief that on 14.10.99, he had taken samples of this crime number along with sample of the seal also. There is no cross examination on this point that he had not taken the sample of the seal and had taken only the sealed packets to the FSL. Moreover, in the FSL report (Ex.-P/25), it has been mentioned in the first line that 2 sealed packets were received by the said Laboratory and the seals which were put on them, were found to be same on comparison as was there in the sample of seal and the figure of the seal has also been sketched in the report. Besides above, the contents of *Malkhana* register has also been proved as Ex.-P/5C, in which it has been mentioned that along with seized article and the sample, a sample of seal was also there and the same was also deposited in *Malkhana* on the relevant date. In this regard *Malkhana Moharrir* Urmila Prasad Pandey (P.W.-4) has been examined by the prosecution, who has stated that on 12.10.99, he had received the deposits of the sealed packets of seized article relating to Crime No. 435/99 along with sample of the seal and had made entries in the said register. Therefore, on appreciation, it cannot be said that the sample of seal was not sent to the

FSL and only the samples of seized article were sent to them. Non-mentioning of the fact regarding sending the sample of seal in the memo of Superintendent of Police Ex.-P/1 appears to be an omission which cannot be held to be fetal to the prosecution in light of other evidence available on record. Another important fact is that if we compare the sketch of the seal mentioned in the FSL report (Ex-P/25) with the original seals put on seizure memos Ex.-P/10 & Ex.-P/11, it would appear that all the seals are similar. This further rules out the possibility that the sample of seal was not sent to the FSL. The arguments advanced by the learned counsel for the appellant in this regard cannot be accepted. It has been establish by the prosecution that in fact, the articles were sealed at the time of seizure and they were deposited in the *Malkhana* in intact condition along with sample of the seal also and were sent for chemical examination to the FSL along with sample of seal, which was also found to be intact and ultimately, the article sent for examination was found to be opium and on the omission about mentioning of sending of sample of seal in the memo of Superintendent of Police, in light of other evidence, the prosecution story cannot be discarded.

(12) Learned counsel for the appellant then argued about the procedural safeguards especially with reference to Section 50 of the N.D.P.S. Act. There is no doubt that the procedural safeguard particularly as provided under Section 50 of the N.D.P.S. Act requires strict compliance. The legislature has deposed confidence on the gazette officer and has recognized the provisions as right of the accused, who has allegedly committed an offence under the N.D.P.S. Act. This is an indication that the offence is of serious and grave nature and the procedural safeguards, some of which are mandatory, are to be strictly complied with by the Investigating Agency.

(13) So far as Section 50 of the N.D.P.S. Act is concerned, the Supreme Court in the matter of ***Madan Lal and another -Vs- State of H.P. (2003) 7 SCC 465*** held that the language of section 50 is implicitly

clear that the search has to be in relation to a person as contrasted to search of premises, vehicles or articles, therefore, it is clear that when a search of article like a "bag" was to be made, it was not necessary for the Police Officer to comply with the provisions of section 50 and in such search and seizure, the trial would not be vitiated for non-compliance of section 50 or for want of proper and effective compliance of section 50 of the NDPS Act.

(14) Moreover, in the present case, a perusal of the judgment vide Para-14 onwards would show that the Investigating Officer has complied with this provision also and after compliance of the said provisions, the search of the bag of the accused was made. Therefore, the arguments regarding non-compliance of statutory safeguard of Section 50, vitiating the conviction of the appellant, can also not be accepted.

(15) Lastly, learned counsel for the appellant submitted that the seized article (Opium) was not produced before the Special Court at the time of trail, therefore, the accused has been prejudiced and the conviction in such situation is not sustainable. He referred to the decision rendered in the matter of ***Jitendra and another -Vs- State of M.P., 2003 SAR (Criminal) 902***. In the said case, the *Panch* witnesses had turned hostile and the Investigating Officer was also not examined and the contraband allegedly seized was also not produced before the Court and in the said circumstances, the Apex Court said that in the trial, it was necessary for the prosecution to establish by the cogent evidence that the alleged quantities of charas and ganja were seized from the possession of the accused. For which the best evidence would have been the seized materials which ought to have been produced during the trial and marked as material objects. Mere oral evidence as to their features and production of *Panchnama* does not discharge the heavy burden which lies on the prosecution, particularly where the offence is punishable with a stringent sentence as under the NDPS, Act. The Court said that since *Panchas* have turned hostile, the *Panchanama* is nothing but a document

written by the concerned police officer and the suggestion made by the defence in cross-examination is worthy of notice. As mentioned supra, the said view taken by the Apex Court in the aforesaid judgment was in a case where after turning the *Panch* witnesses hostile, even the Investigating Officer was not examined and against this background, the conviction was set aside observing that the non-production of material object/seized material was not a mere procedural irregularity but it caused prejudice to the accused. In the present case, Investigating Officer has been examined and his testimony has been found to be trustworthy. Therefore, only on the ground that the seized contraband was not produced before the Court, the entire prosecution case cannot be thrown out and the judgment of the Apex Court is distinguishable on this point. This argument raised by learned counsel for the appellant cannot be accepted.

(16) Now the question arises about testimony of Investigating Officer, Rajesh Tiwari (P.W.-7). He has deposed that when he had left the police station for a particular place after getting certain information regarding *marpit*, relevant entry was made in *Rosnamchasana* and when he was in bus stand area, he could come to know that some persons are there in suspicious condition holding bags. They were located by him and ultimately, after complying the provisions of Section 50 of N.D.P.S. Act (though it was not required in this case) as also other provisions in this regard, he made the search of bag of the appellant, in which opium in quantity of 4 Kgs. was there. *Tol Panchanama* and seizure *Panchanama* were prepared and the seized article along with sample of articles and the sample of seal were prepared and the accused was taken into custody. After returning to the police station, the articles were deposited in the *Malkhana* making relevant entry in the *Malkhana* register proved as Ex.-P/5C. Thereafter, the sample of article along with sample of seal were sent for chemical examination to the FSL through the memo of Superintendent of Police (Ex.-P/1) and the report (Ex.-P/25) was received, according to which, the seized article was opium.

(31) (32)

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**(17)** After going through the evidence of the Investigating Officer as also the evidence of other witnesses, as discussed above, I do not find any discrepancy in his such evidence and the conviction on such evidence was possible. The Special Court has committed no error of law by depending on the sole testimony of the Investigating Officer, Rajesh Tiwari (P.W.-7) and the conviction based upon such testimony cannot be faulted with.

**(18)** There is no merit in the appeal, the same is accordingly dismissed.

Sd/-
Sunil Kumar Sinha
Judge

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